

***NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 02-111-06
MARCH 26, 2000***

***Protected Resources Management
Section 6 Agreements***

***COOPERATIVE AGREEMENT AMONG NMFS AND STATE OF NC WILDLIFE
RESOURCES COMMISSION FOR THE CONSERVATION OF
THREATENED AND ENDANGERED SPECIES***

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ENDANGERED SPECIES ACT
SECTION 6 COOPERATIVE AGREEMENT AMONG
THE NATIONAL MARINE FISHERIES SERVICE
OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
OF THE U.S. DEPARTMENT OF COMMERCE, AND
THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION
FOR THE CONSERVATION OF ENDANGERED AND THREATENED SPECIES

This limited authorities Cooperative Agreement is entered into pursuant to Section 6(c) (1) of the Endangered Species Act of 1973, 16 U.S.C. §1531 *et seq.*, ("the Act"), between the National Marine Fisheries Service ("NMFS"), an agency of the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, and the North Carolina Wildlife Resources Commission ("NCWRC").

I

WHEREAS, the Congress of the United States has found that there are resident species of fish or wildlife which are in danger of extinction and that these species of fish or wildlife are of aesthetic, ecological, educational, scientific, economic, and other value to the Nation and its people;

II

WHEREAS, the purposes of the Act are to provide a means whereby the ecosystems upon which endangered or threatened fish or wildlife depend may be conserved, to provide a program for the conservation of such species, and to take such steps as may be appropriate to achieve the purposes of the various treaties and conventions related to the conservation of fish or wildlife;

III

WHEREAS, the Congress of the United States has declared that encouraging the states and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in its fish or wildlife;

IV

WHEREAS, the Secretary of Commerce has delegated responsibilities under the Act to the NMFS;

V

WHEREAS, NMFS desires to enter into this Agreement for the purpose of assisting in the implementation of the endangered and threatened fish or wildlife conservation programs of

the State of North Carolina for those species under NMFS' jurisdiction pursuant to Reorganization Plan Number 4 of 1970 and any subsequent agreement with the U.S. Fish and Wildlife Service;

VI

WHEREAS, the State of North Carolina, acting through NCWRC, wishes to administer its programs for the conservation of endangered or threatened fish or wildlife listed in Appendix I of this Agreement in harmony with the terms and spirit of the Act;

VII

WHEREAS, the parties agree that programs of NCWRC are designed to assist resident endangered fish and wildlife listed in Appendix I and that it is the mutual desire of NCWRC and NMFS to work in harmony for the common purposes of planning, developing and conducting programs to protect, manage and enhance populations of all resident endangered or threatened fish or wildlife within this state listed in Appendix I;

VIII

WHEREAS, NMFS has the statutory and administrative responsibility to establish programs for the conservation of endangered and threatened species which are under its jurisdiction pursuant to Reorganization Plan Number 4 of 1970 and any subsequent agreement with the U.S. Fish and Wildlife Service; to reach agreement with NCWRC as to which resident endangered or threatened species are most urgently in need of a conservation program in the State of North Carolina; to provide review of the NCWRC program at annual intervals; to provide funding to that program as such funding is available and in accordance with the terms of the Act; to provide coordination among the programs of the various States; and to exchange with NCWRC such biological data or other information which may result in the enhancement of the opportunities for the continued survival of endangered or threatened fish or wildlife;

IX

WHEREAS, NCWRC has statutory and administrative responsibility to conserve endangered or threatened fish or wildlife which are resident in the State of North Carolina, including waters of the State of North Carolina, and listed in Appendix I of this Agreement;

X

WHEREAS, NCWRC (a) has authority to conserve resident fish or wildlife determined by the NCWRC or the Secretary to be endangered or threatened and listed in Appendix I of this Agreement; (b) has established an acceptable conservation program, consistent with the purposes and policies of the Act, for all resident fish or wildlife in the State of North Carolina which are deemed by the Secretary to be endangered or threatened and listed in Appendix I, and has furnished a copy of such program together with all pertinent details, information and data requested by the Secretary; (c) is authorized to conduct investigations to determine the status and requirements for survival of resident fish and wildlife listed in Appendix I; (d) has

authority to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened fish or wildlife listed in Appendix I; and (e) provides for public participation in the designation of resident fish or wildlife as endangered or threatened;

Now, therefore, the parties agree as follows:

1. Cooperative Program

(a) NCWRC shall carry out the activities identified in its conservation programs and included in Appendix II of this Agreement for the benefit of the endangered or threatened fish or wildlife which are resident in the State of North Carolina including marine waters under the jurisdiction of North Carolina and listed in Appendix I of this Agreement.

(b) In order to ensure that NCWRC has established an acceptable conservation program, consistent with the purposes and policies of the Act, for those species listed in Appendix I, on June 30 each year, in conjunction with the reporting requirements required by section 5(b) of this Agreement, NCWRC shall furnish to NMFS all pertinent details, information and data requested by NMFS, that identifies the conservation programs for those species that NMFS and NCWRC agree are most urgently in need of such conservation programs. This shall include information as specified in Appendix II of this Agreement.

(c) NMFS may agree with NCWRC to provide financial assistance for the implementation of an acceptable project for the conservation of endangered and threatened fish or wildlife. Such financial assistance will require the submission of an application for Federal Assistance and Grant-In-Aid Award and successful negotiation of a Project Agreement.

(d) As additional species of resident fish or wildlife in the State of North Carolina are determined by NMFS to be endangered or threatened pursuant to Section 4(a) of the Act, the parties agree to revise Appendix I promptly upon such final determination, and upon a determination by NMFS based on a submission of information by NCWRC, that NCWRC maintains an adequate and active conservation program with respect to such species, and to cooperate in the development of programs and projects for the benefit of such species.

(e) It is understood that any Federal funding pursuant to Section 6(d) of the Act is contingent on the continued implementation of an adequate and active program for the conservation of Federally listed endangered and threatened fish or wildlife which are resident in the State of North Carolina and which are listed in Appendix I. If the program for conservation of such fish or wildlife is determined by NMFS to be inadequate or inactive, this Agreement and funding pursuant thereto shall be terminated in accordance with section 7 of this Agreement.

(f) As part of the listing, designation, and recovery plan processes of Section 4 of the Act, the consultation process of Section 7 of the Act, and the permit process of Section 10 of the Act, and in accordance with the policy issued by NMFS and the U.S. Fish and Wildlife Service on July 1, 1994, with respect to cooperation with State governments, the parties agree to exchange biological and other data as necessary to facilitate implementation of the ESA with respect to resident fish and wildlife in the State of North Carolina.

(g) All activities affecting endangered and threatened marine mammals shall be consistent with the Marine Mammal Protection Act of 1972, 16 U.S.C. §1361 *et seq.*, as well as with the Act.

(h) As part of this cooperative program, the law enforcement authorities of NMFS and the State of North Carolina shall cooperate in the detection, apprehension, and prosecution of violators of the Act or of State laws which are intended to conserve endangered and threatened fish or wildlife. This Agreement does not grant Federal enforcement authority to State enforcement officers or State enforcement authority to NMFS officers.

(i) Entering into this Agreement shall not affect the applicability of prohibitions set forth in or authorized pursuant to Section 4(d) or Section 9(a)(1) of the Act.

2. Permits, Exceptions.

(a) General Rule. Except as authorized in subsection 2(b), (c), or (f) of this Agreement, NCWRC agrees not to engage in, or issue a permit authorizing the taking of, any resident Federally endangered fish or wildlife listed at 50 C.F.R. 222.23(a), or any resident Federally threatened fish or wildlife listed at 50 C.F.R. 227.4 the taking of which is prohibited, which is listed in Appendix I of this Agreement, without the prior issuance of a permit to the applicant by NMFS.

(b) Marine Mammals. Any employee, designee or agent of NCWRC is authorized to take in a humane manner endangered or threatened marine mammals in the course of his or her duties without a Federal permit only if such taking is for (a) the protection or welfare of the marine mammal, (b) the protection of the public health and welfare, or (c) the non-lethal removal of nuisance animals.

(c) Threatened and Endangered Species. For any program or project listed in Appendix II of this Agreement, any employee or agent of NCWRC who is designated by NCWRC for such purposes, when acting in the course of his or her official duties within the waters under the jurisdiction of NCWRC and under general permit authority of NCWRC, may take any resident Federally endangered fish or wildlife, or threatened fish or wildlife the taking of which is prohibited by regulation other than marine mammals which are subject to subsection

2(b), for conservation purposes defined in Section 3(3) of the Act, that are consistent with the purpose of the Act and that are consistent with this Agreement, or any Project Agreement, entered into pursuant to this Agreement, provided that such taking is not reasonably anticipated to result in:

- (1) the death or permanent disabling of the specimen;
- (2) the removal of the specimen from the State of North Carolina;
- (3) the introduction of the specimen or any of its progeny into an area beyond the historical range of the species as determined by NMFS; or
- (4) the holding of the specimen in captivity for a period of more than 45 consecutive days.

(d) Suspension. The authority conveyed under subsections 2(c) and (d) may, at any time, be temporarily suspended for a particular project or part of a conservation program identified in Appendix II, by written notification from the Assistant Administrator for Fisheries of NOAA, or his or her authorized delegate, upon receipt of substantial evidence demonstrating that the use of this authority is inconsistent with the purposes of the Act. Upon notification of the temporary suspension and the reasons therefore, NCWRC may request from the Assistant Administrator for Fisheries of NOAA an opportunity to demonstrate compliance with the purposes of the Act. The Assistant Administrator for Fisheries shall promptly consider the evidence so submitted by NCWRC and either reaffirm the initial conclusion, revoking NCWRC's authority for that particular project or program pursuant to this Agreement, or reject the initial conclusion and reinstate NCWRC's authority for that particular project or program of this Agreement.

(e) Emergency Provisions. Any employee or agent of NCWRC who is designated by NCWRC for such purposes, when acting in the course of official duties and under the general permit authority of NCWRC, may take Federally endangered fish and wildlife, and threatened fish or wildlife the taking of which is prohibited by regulation, if such action is necessary to:

- (1) aid a sick, injured, or orphaned specimen; or
- (2) dispose of a dead specimen; or
- (3) salvage a dead specimen which may be useful for scientific study; or

- (4) remove specimens which constitute a demonstrable, but non-immediate, threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injury only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in a remote area; or
- (5) defend his or her own life or the lives of others.

(f) Reporting. Any taking pursuant to subsection 2(f) must be reported in writing within 5 days to either the NMFS Regional Administrator for transmission to the NMFS Office of Enforcement or to the NMFS Special Agent in Charge of the Southeast Office of Enforcement. The specimen may only be retained, disposed of, or salvaged in accordance with directions from NMFS.

3. Records.

In addition to any further record keeping requirements for specific programs or projects that may be set forth in Appendix II of this Agreement, NCWRC shall maintain records of: (1) its Federally funded projects for the conservation of endangered and threatened fish or wildlife listed in Appendix I in accordance with the Federal Aid Manual; and (2) the number of specimens of each species of Federally listed endangered and threatened fish or wildlife listed on Appendix I taken by NCWRC officials or agents pursuant to subsections 2 (c) and (d) of this Agreement, the conservation purposes for which they were taken, and any mortalities or permanently disabling injuries resulting from the taking.

4. Notification.

(a) NCWRC agrees to inform NMFS of any change in circumstances that could cause the program to be out of conformance with the requirements of Section 6 (c) of the Act, including changes in NCWRC's relevant constitutional, statutory, or regulatory authority. NCWRC shall promptly furnish NMFS with an assessment of the effect of such a change on NCWRC's ability to remain in compliance with the requirements of Section 6 (c) of the Act.

(b) NCWRC agrees to promptly inform NMFS of any change in the programs or projects identified in Appendix II, or any change in circumstances that affect such programs or projects.

(c) NMFS agrees to notify NCWRC of all regulations, issued in accordance with

Section 4 of the Act, which might affect the adequacy and effectiveness of the conservation program for NCWRC.

5. Effective Date and Renewal.

(a) This Agreement shall become effective when signed by the Assistant Administrator for Fisheries of NOAA, and the Executive Director of the NCWRC.

(b) This Agreement may be renewed in the following manner: (1) No later than June 30 of each year NCWRC shall submit to NMFS the following: (i) an updated list of Federal and State listed endangered and threatened fish and wildlife which are resident in the State of North Carolina and a statement of any modifications NCWRC wishes to propose to the list of fish or wildlife species; (ii) a memorandum of law analyzing any changes in NCWRC statutory authority for the protection and conservation of endangered and threatened fish or wildlife, if any changes in statute or regulation were made since the date of the previous program submission; (iii) a description of any substantial changes in NCWRC programs for the resident endangered and threatened fish or wildlife which are being proposed or which have occurred since the date of the previous program submission; (iv) a detailed description of the number of specimens of each species of Federally listed endangered and threatened fish or wildlife listed in Appendix I taken by NCWRC employees or agents pursuant to subsections 2 (c) and (d) of this Agreement, the conservation purposes for which they were taken, and any mortalities or permanently disabling injuries resulting from the taking; and (v) copies of such reports NCWRC may have prepared since the previous program submission which discusses its conservation program accomplishments for listed endangered and threatened fish or wildlife. For purposes of this Agreement, the phrase "previous program submission" means either the program submission of the original Agreement or the most recent renewal application of this Agreement, whichever is later in time.

(2) The Assistant Administrator for Fisheries of NOAA or his or her authorized delegate will notify NCWRC in writing on or before October 1 of each year that: (i) this Agreement is renewed effective October 1 of that year upon a reconfirmation of the finding that NCWRC maintains an adequate and active program for the conservation of resident threatened and endangered species listed in Appendix I of this Agreement; or (ii) NCWRC programs or authorities are not in compliance with the criteria of Section 6 (c) of the Act. Such notification in the latter situation shall also state that unless appropriate changes are made by June 30 of the following year, this Agreement shall be terminated. If NCWRC has not received notification concerning the renewal of this Agreement by October 1 of each year, the Agreement shall continue in force and effect as if it had been renewed.

6. Amendments.

Any part of this Agreement or Appendices thereto may be amended at any time with the concurrence of the signatory parties or their authorized delegates.

7. Termination.

This Agreement may be terminated: (a) by mutual agreement; (b) by NCWRC upon 60 days written notice to the Assistant Administrator for Fisheries; or (c) notwithstanding the renewal provision of subsection 6 (b) of this Agreement, by the Assistant Administrator for Fisheries, NOAA, or his or her authorized delegate upon 60 days written notice to NCWRC from NMFS stating reasons why NCWRC conservation programs are no longer in compliance with the criteria of Section (c) of the Act or that NCWRC has violated a provision of this Agreement. NCWRC may submit a written request for review to the Secretary of Commerce within 30 days of receipt of the termination notice. The Secretary shall consider all evidence submitted by NCWRC in its request for review and either reaffirm the conclusion of NMFS and terminate this Agreement at the end of the 60-day notification period, or reverse the conclusion of NMFS and revoke the notice of termination. Any provision in Appendix II may also be terminated in accordance with section 7 of this Agreement. Any Federal funds that have been obligated to, but not expended by, NCWRC as of the date of the termination notice pursuant to any of the above provisions, shall be retained by NMFS for reallocation pursuant to Section 6(d) of the Act, unless: (1) those funds are specifically approved for expenditure before the date of actual termination; (2) or the notice of termination is revoked by NMFS.

Assistant Administrator for Fisheries,
National Oceanic and Atmospheric Administration

Date

Executive Director,
North Carolina Wildlife and Resources Commission

Date

APPENDIX I

Endangered Species

Shortnose sturgeon (*Acipenser brevirostrum*)
Humpback whale (*Megaptera novaeangliae*)
Sperm whale (*Physeter macrocephalus*)
Right whale (*Eubalaena glacialis*)
Finback whale (*Balaenoptera physalus*)
Sei whale (*Balaenoptera borealis*)
Blue whale (*Balaenoptera musculus*)
Hawksbill sea turtle (*Eretmochelys imbricata*)
Kemp's ridley sea turtle (*Lepidochelys kempii*)
Leatherback sea turtle (*Dermochelys coriacea*)
Green sea turtle (*Chelonia mydas*)*

Threatened Species

Loggerhead sea turtle (*Caretta caretta*)

*Green turtles are listed as threatened, except for breeding populations of green turtles in Florida and on the Pacific Coast of Mexico, which are listed as endangered.

Appendix II

Attachment B

The following information was submitted by the North Carolina Division of Wildlife Management, Nongame and Endangered Wildlife Program, on December 17, 1999, in response to comments received from NMFS.

The North Carolina Wildlife Resources Commission (NCWRC) seeks to carry out the following research priorities and actions should funding be secured for such activities:

1. Develop and implement in-water research projects that will help with sea turtle recovery efforts and determine state fishery impacts on turtles.
 - a. Identify inshore and nearshore habitat utilized by turtles throughout the annual cycle.
 - b. Identify environmental cues that influence turtle movement patterns within state waters.
 - c. Identify migration and emigration patterns of turtles in state waters.
 - d. Ascertain seasonal abundances of turtles in state waters.
 - e. Implement other research efforts that will provide a sound basis for the development and enactment of future conservation measures.
2. Establish a cooperative working relationship with North Carolina Division of Marine Fisheries to ensure that fishery impact issues are addressed and to develop an avenue through which the NCWRC can make sound fishery policy/management recommendations that are designed to help reduce turtles mortality in state waters.
3. Continue to expand coverage of inshore areas by the North Carolina Sea Turtle Stranding and Salvage Network.
4. Become involved with other protected species projects such as the shortnose sturgeon as recommended/funded by NMFS.